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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 59

DONALD LOFTUS,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent

BRIEF FOR PETITIONER

Opinion Below

The opinion of the Supreme Court of Illinois (R. 36-41) is reported at 395 Ill. 479, 70 N. E. 2d 573.

Jurisdiction

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Criminal Code, as amended by the Act of February 13, 1925 (U. S. C. Title 28, Sec. 344).

The decision of the Supreme Court of Illinois, in response to a statutory writ of error (Ill. Rev. Stat. (1937), c. 38, Sec. 771), affirmed four judgments convicting petitioner of crime. It was filed on November 20, 1946, and a petition for rehearing (R. 42), filed on December 12, 1946, was denied

on January 20, 1947 (R. 49). Petitioner's motion for leave to proceed *in forma pauperis* in this Court and his petition for certiorari were filed on March 29, 1947, and granted on February 9, 1948 (R. 50).

Questions Presented

(1) Whether the due process of law provided by the Fourteenth Amendment to the Constitution of the United States was violated by the deprivation of access by petitioner to his attorney in all four cases.

(2) Whether the due process of law provided by the Fourteenth Amendment to the Constitution of the United States was violated by the denial to petitioner and his appointed counsel of adequate opportunity for consultation and preparation before the trials on the two indictments for armed robbery (Nos. 25503 and 25505).

(3) Whether the due process of law provided by the Fourteenth Amendment to the Constitution of the United States required the representation of petitioner by counsel appointed by the court in the trials on the two indictments for burglary (Nos. 25504 and 25506) following his convictions pursuant to two other indictments for armed robbery (Nos. 25503 and 25505) involving the same alleged incidents, in the absence of his first appointed attorney.

Statement

A detailed account of the representation of petitioner at various stages in the proceedings of the trial court is necessary to a determination of the principal issue, *i.e.*, whether the petitioner's representation satisfied the requirements of due process of law. Variants in the factual situation on this issue are presented on the record of the arraignment on the four indictments, the trial on the two indictments

for armed robbery, and the trial on the two indictments for burglary. Also, the cumulative impact of the conduct of the case in the trial court at all stages with regard to the right of counsel has an important bearing upon the determination of fairness.

This Court is all too familiar with the limitations and inadequacies of the facts of record available for consideration in review of proceedings on writs of error in Illinois where no Bills of Exception are filed and reliance is confined to the common law record. *Cf.* concurring opinion of Mr. Justice Rutledge in *Marino* v. *Regan*, No. 93, October Term 1947 (Dec. 22, 1947), and particularly Footnotes 8, 9 and 10; *Cf.* also *Carter* v. *Illinois*, 329 U. S. 173 and *Foster* v. *Illinois*, 332 U. S. 134. This common law record includes the indictments and the judge's minute entries on the arraignment, the plea, the trial, verdict and the judgment. It leaves unanswered or for inference many questions vital to a full and complete recital.

* * * * * * *

Petitioner is a prisoner in the penitentiary, having served imprisonment since 1932.

On April 9, 1932, four indictments were entered against him by the Grand Jury of McHenry County, Illinois. He was accused of two bank robberies, said to have occurred at separate times and places, with charges made of both armed robbery and burglary in connection with each of the two separate incidents. Each indictment was filed and docketed as a separate case and the common law record shows that each case was tried separately.

Indictment No. 25503 for a robbery with a gun concerned the alleged robbery of the First National Bank of Marengo, Illinois (R. 1-4).

Indictment No. 25505, also for robbery with a gun, concerned the alleged robbery of the Algonquin State Bank, also in Illinois (R. 9-12).

Indictment No. 25504 for burglary arose out of the alleged robbery of the Marengo Bank (R. 23-25).

Indictment No. 25506, for burglary, arose out of the alleged robbery of the Algonquin State Bank (R. 17-19).

Further, on April 9, 1932, the petitioner was arraigned before the Circuit Court of McHenry County under each indictment. The minute entries in the common law record for that day show that in each case the petitioner appeared for arraignment without counsel, stated to the court his lack of counsel and inaccessibility to funds, and asked the court for a week's continuance in order to get his own counsel, a Mr. W. W. Ryan, who at that time was busy in Chicago (R. 5, 13, 19, 25). In each case the court rejected the petitioner's request, and appointed temporary counsel (R. 5, 13, 17, 25). The following entry appears in the minutes of the Circuit Court for April 9, 1932, in No. 25503:

> "Whereupon it is ordered by the court that David R. Joslyn, Jr. be, and he is hereby appointed temporary counsel to make motions in behalf of said defendant. Thereafter conferring with David R. Joslyn, Jr., his counsel, again comes the said defendant and enters a temporary plea of not guilty of robbery with a gun in manner and form as charged in said indictment, until he has time to confer with his attorney, W. W. Ryan.
>
> "It is therefore ordered by the court that said plea of not guilty be and the same is hereby entered of record" (R. 5).

A similar entry with the appropriate variation for the description of the offense charged appears in the common law record for the other cases (R. 13, 19, 25).

With pleas of not guilty having been entered in all four cases, they were set for trial Monday, April 18, 1932. On

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that day it appears from the common law record that a Mr. David H. Feldman appeared on petitioner's behalf in No. 25503 and No. 25505 (R. 5-6, 13). Although the background of Mr. Feldman's appearance does not appear from the common law record, the inference from the Petition for Rehearing (R. 42 at p. 46) [1] is that he was appointed by the court at some unidentified time between April 9, 1932, the date of the indictments, and April 18, 1932, the date set for trial.

When the first case involving indictment No. 25503 was called, Mr. Feldman, counsel for petitioner, moved the court for a continuance, which motion was denied by the court (R. 6). He then moved to quash the indictment and, after hearing arguments of counsel, that motion was also denied and the case called for trial (R. 6). The following then appears in the minute entry in No. 25503 for April 18:

> "It is further ordered by the court that Maurice T. Johnson be, and he is hereby appointed to assist David H. Feldman, defendant's counsel, in selecting the jury and trying the case."

The case was tried before a jury. At the close of the plaintiff's case, the defendant, by his counsel, moved for time to get witnesses; the following entry appears:

> "Whereupon the court allowed defendant's counsel 10 minutes to confer with defendant as to witnesses" (R. 6).

It does not appear from the entry whether or not witnesses were called for the defendant.

---

[1] Petitioner, in this Petition for Rehearing to the Supreme Court of Illinois, refers to the fact that "on April 22, 1932, plaintiff in error's Original Counsel, who had been appointed by the Trial Court, Returned and Re-entered the Case" (R. 46). That person, as the minute entries for April 22 show, was Mr. Feldman (R. 7, 15, 21, 27) who entered an appearance for petitioner at the trial of Indictments No. 25503 and 25505 (R. 5, 13).

Arguments of counsel were waived by agreement and the case was submitted to the jury which, having been instructed by the court, later in the day brought in a verdict of guilty in the manner and form as charged in the indictment. Counsel Feldman for the petitioner, entered a motion for a new trial.

On the same day (April 18, 1932), in No. 25505, Feldman also entered his appearance as counsel for the petitioner and also Attorney Maurice T. Johnson, appointed by the court in No. 25503 to assist Feldman, was listed as assisting (R. 13). After the jury was called and sworn, they were excused until the following day, Tuesday, April 19. On that day petitioner's counsel, Mr. Feldman, did not appear. A telegram from him to the State's Attorney was filed in the cause and appears in the minute entry for April 19, as follows:

> "Received at 2-7 Chicago, Ills., 948AM 19 Woodstock, Ill. States Atty. Lumley Court House, Woodstock, 'Ills. Cannot appear in court today for Loftus.
>
> David H. Feldman."

In the absence of petitioner's counsel, the court appointed Attorney Maurice T. Johnson to defend him. A jury was selected and empaneled and the trial proceeded. The common law record is uninformative as to the nature of the trial and it is not apparent whether or not witnesses were called for the petitioner. It does appear that arguments were made to the jury by the State's Attorney and, by inference, that no argument was made on behalf of petitioner by Attorney Johnson, appointed to defend him (R. 14). After the jury brought in a verdict of guilty, the following notice appears:

> "Whereupon comes the defendant herein and enters his motion for a new trial" (R. 15).

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On the same day, April 19, the trial proceeded in the two cases involving indictments Nos. 25504 and 25506 for burglary. In neither case was petitioner represented by counsel and in both cases the jury brought in the verdict of guilty.

The minute entry in No. 25506 reads as follows:

> "Whereupon the defendant is informed by the Court that Maurice T. Johnson has asked to be excused from further service on this case and the Court states to the Defendant that Maurice T. Johnson had been appointed to defend defendant in two previous cases, and hearing the testimony, under the circumstances of the case, the Court is disinclined to appoint any member of the bar as defendant's counsel to appear as counsel in this case.
>
> "Whereupon it is ordered by the court that Maurice T. Johnson be and he is hereby excused from further service as counsel for defendant in this case.
>
> "Whereupon the Court instructs the defendant that he will give him time to get counsel and the defendant informs the Court that he has no funds of his own to employ counsel and that they are tied up" (R. 20).

In the minute entry for the trial of indictment No. 25504, the following appears:

> "Whereupon the Court informs the defendant that he will give the defendant time to procure counsel and the defendant informs the Court that he has no counsel and no funds to procure counsel as his funds are tied up.
>
> "Whereupon the Court informs the defendant that he is disinclined to appoint any member of the bar as defendant's counsel owing to the circumstances in the previous cases where counsel was appointed" (R. 26).

No copy of the telegram from petitioner's originally appointed counsel, Mr. Feldman, which was included in the record in No. 25505 (R. 14) was entered in the judge's minute entries of these two trials, but it may be assumed that the court continued to be aware of his telegram. Thus,

it appears in both cases that the court not only determined to proceed with the trial of petitioner in the absence of his originally appointed counsel, but also excused from further service counsel which the court had appointed to defend petitioner in two previous cases, one tried that same day and the other the day before, and likewise refused to appoint any other member of the bar as petitioner's counsel, although informed by the defendant that he had no funds available to employ counsel on the spot.

The minute entries covering the actual trials on indictments Nos. 25506 and 25504 are not very informative. The court apparently asked the petitioner in each case if he wished to examine any of the jurors and was informed by the defendant that he did not care to examine any of the jurors, who were accordingly empaneled, without challenge, to include a number who had served in the trial of indictment No. 25503 (Cf. lists on R. 6, 14, 20, 26).[2]

The petitioner attempted to cross-examine the prosecution witnesses in both the trials (R. 20, 26). With this exception, it would seem that the trials proceeded without any element of defense, there being no arguments to the jury, or even motions such as had been made by the defendant petitioner's counsel, Mr. Feldman, in No. 25503 (R. 6). After the verdicts were brought in in both cases, the petitioner entered his own motion for new trial in each case.

The motions for new trials in each of the four cases were set down and heard on April 22 (R. 7, 15, 21 and 27). On that day petitioner was represented again by Mr. Feldman, his originally appointed counsel. He argued both motions for a new trial and motions in arrest of judgment in all four cases; they were overruled and the court ordered judg-

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[2] Six of the jurors who sat in No. 25503, involving the armed robbery of the Marengo Bank, sat in No. 25506, involving the burglary of the Algonquin Bank. One juror in No. 25503, a Mr. Al. Klemme, sat in No. 25504, involving the burglary of the same bank.

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ment entered. In each of the four cases judgment was entered on that day and the defendant petitioner sentenced to serve in the state penitentiary from one year to life, the term of such imprisonment and commitment to be terminated earlier than the maximum by the Department of Public Welfare and with the approval of the Governor. The sentences were consecutive, rather than concurrent, the judgment orders for Case No. 25505 reading that the sentence

> "is to run consecutively with the sentence in Case No. 25503" (R. 17);

further, in case No. 25506, that the sentence

> "is to run consecutively with the sentences in Case Nos. 25503 and 25505" (R. 23);

and further, in case No. 25504, that the sentence

> "is to run consecutively to the sentences in Case Nos. 25503, 25505 and 25506" (R. 28).

Hence petitioner, upon serving sentences under Nos. 25503 and 25505, as determined by the Department of Public Welfare, with the approval of the Governor, might still be required to serve additional imprisonment by reason of his conviction under No. 25504 and No. 25506. Petitioner is still confined in the penitentiary, having served more than sixteen years.

Petitioner sued out a writ of error on September 16, 1946, filing a duly certified transcript of the record and proceedings of the court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned (R. 35-36). However, only the abstract of record filed on July 18, 1946 (R. 29-34) and the assignments of error (R. 35) appear in this record; also it appears from the court's opinion that following the usual

procedure in considering writs of error, where no exceptions are filed, the Illinois Supreme Court only considered the common law record. (See first paragraph of opinion, R. 36, and last paragraph, R. 41.)

The opinion of the court on the writ of error assumed that petitioner sought the reversal of all four judgments of the Circuit Court of McHenry County entered in the four separate cases in April, 1932. (See opinion, R. 36.) The errors assigned included the general one that petitioner was denied due process and equal protection of the laws in violation of both State and Federal Constitutions and certain particular ones, including one that "the trial court erred in withdrawing temporary counsel and denying the appointment of other counsel, forcing defendant to continue the case without counsel" (R. 35).

In addition, the petitioner assigned as error his trials for burglary after he had been tried and convicted of robbery arising out of the same crimes, the entry of consecutive sentences as not made in accordance with the law and, finally, the allowance of some of the same jurors to serve in more than one of his various trials (R. 35).

In affirming the judgments, the Supreme Court of Illinois rejected the contention of the state that one writ of error could not be used to review more than one record. It rejected the double jeopardy contention on the ground that, under the decisions of the Illinois courts and the language of the various indictments, there was not a conviction "for the same offense" within the meaning of the Illinois State Constitution. The opinion also noted that no Bills of Exceptions had been filed and that there was no showing that a plea of former conviction was entered.

It rejected the contention that the consecutive sentences were not in accordance with law on the basis of decisions of the Illinois courts holding such sentences to be legal and defending the manner of their entry in this case.

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In rejecting the contention that it was error to allow some of the jurors to serve in more than one of the various trials, the Supreme Court of Illinois relied upon the technical defects in the handling of the case and did not meet the contention on the merits, saying:

> "There is no Bill of Exception in the record. There is nothing in the common law record showing that any challenge was interposed to the qualification of any juror either for cause or peremptorily. This contention can not be considered" (R. 41).

On the major point, involving the right to counsel, the Supreme Court of Illinois likewise placed its rejection on technical grounds. After referring to the statutory requirement that the court will provide counsel for a defendant

> "only when he shall state on oath he is unable to procure counsel"

the opinion read

> "there is nothing in the record to show that plaintiff in error complied with the provisions of the statute in force at the time of his trials" (R. 39).

It limited its consideration on this point to the question of whether the trial court had violated the state statute and did not go into the issue of whether or not the State or Federal Constitutions had been violated, saying only:

> "Plaintiff in error does not argue his assignment of error that he was denied due process and equal protection of the law, in violation of the State and Federal Constitutions, except to say that he did not have a fair trial." (R. 41).

Following there appears the somewhat cryptic and unparticularized conclusion that:

> "The record in this case presents an unusual situation. An examination of the common law record in each case does not show any reversible error, therefore the judgments in each case are confirmed."

Specification of Errors to Be Urged

The Supreme Court of Illinois erred:

(1) In affirming the judgments of the Circuit Court of McHenry County in the four cases involved.

(2) In failing to hold that petitioner was tried and convicted in each case in a manner which deprived him of due process and equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States.

(3) In failing to hold that petitioner was illegally denied and deprived of counsel.

(4) In holding that the petitioner could be tried for the crimes of robbery and burglary arising out of the same crime, without being placed in double jeopardy.

(5) In holding that sentences could be entered consecutively in a manner which does not conform with the law.

(6) In holding that it could not consider the assignment of some of the same jurors to more than one of the series of cases in which petitioner was tried.

(7) In failing to reverse the judgments and sentences of the Circuit Court of McHenry County, Illinois.

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Summary of Argument

I

Petitioner's conviction in any of the four cases can not be sustained if, in each case, he was illegally deprived of use of his own attorney. It is a denial of petitioner's right to a fair trial to force him to plead to an indictment without the aid and advice of his counsel, whose presence he requests, or to undergo trial on a serious criminal charge without such counsel; a defendant should be afforded a fair opportunity to secure counsel of his own choice.

In each of the four cases involved here, the minutes of the common law record show that at the time petitioner was arraigned he asked the court for a week's continuance in order to have the aid and assistance of his own counsel who was then busy in another city some distance away. In every case this request, reasonable upon its face, was rejected and the petitioner compelled to continue with the arraignment proceedings assisted by "temporary counsel" appointed "to make motions in behalf of said defendant." Insofar as the record shows, no motions were made and in each case the only action of the defense recorded was the entry of a "temporary plea of not guilty."

The Court need not consider whether the state would have been required to appoint counsel for petitioner in each of the four cases if it feels that defendant was not afforded a fair opportunity to secure counsel of his own choice.

II

The appointment of counsel for the defendant and their representation of him in the trials of indictments Nos. 25503 and 25505 did not constitute effective and substantial aid in that regard because they did not include the accustomed

incidents of advance consultation and opportunity for preparation before trial. The appointments in both cases constituted nothing more than a formal compliance with the state constitution's requirement that an accused be given the assistance of counsel under certain conditions. They did not satisfy the requirements of fairness inherent in the Fourteenth Amendment.

It is a fair inference from the common law record that during the most critical period of proceedings against the defendant, that is to say, from the time of his arraignment until the beginning of the trials when consultation, thorough-going investigation and preparation were vitally important, the defendant did not have the aid of counsel in any real sense, although he was entitled to it during that period as at the trial itself.

It appears definitely from the common law record that the counsel designated was unprepared at the time of the trials of indictments Nos. 25503 and 25505. When the first case was called (No. 25503) the appointed counsel for petitioner moved for a continuance which was denied. As the case was called for trial the court appointed an additional counsel to help the one designated before the trial in selecting the jury and trying the case; it is a fair inference then that the appointed counsel felt inadequately prepared for the task. This was dramatically confirmed when, at the close of the state's case, defendant's counsel moved for time to get witnesses and the minutes of the common law record revealed that the court allowed defendant's counsel 10 minutes to confer with him as to witnesses. It does not appear that any witnesses were called for the defense or whether or not there was cross-examination of the state's witnesses. Arguments were waived.

In the trial of the second case (No. 25505) on the following morning, April 19, when the first appointed counsel

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did not appear, petitioner was represented by the second appointed counsel, named to assist his originally appointed counsel on the preceding day in the first case. It does not appear from the record that either petitioner or the second appointed counsel had any opportunity to confer or prepare for the second case, the appointment being made at the outset of the session resuming trial upon the filing of the telegram by the state's attorney from the first appointed counsel that he could not appear in court that day.

Under this procedure, petitioner was denied the right of counsel with the accustomed incidents of consultation and opportunity for preparation before trial and, in effect, was stripped of his right to have sufficient time to advise with counsel and prepare his defense.

III

The circumstances of the particular situation in the trials of indictments Nos. 25504 and 25506 required representation by counsel appointed by the court for due process of law in the absence of petitioner's attorney. The withdrawal of temporary counsel for the trial of these two cases, the refusal of the court to appoint additional counsel, and the conduct of the trials without any representation for the defendant, resulted in a deprivation of his rights violative of the Fourteenth Amendment.

Petitioner, a layman, was confronted with the necessity of conducting his own trials so as to sustain his pleas of "not guilty." He had to conduct his own defense through the normal procedures of a criminal trial which, in its simplest form, involves such technicalities and requirements for judgment and experience as to impel customarily the retention of skilled counsel for the defendant able to employ such assistance. The jurys were empaneled, the state's witnesses were put on the stand and examined by

the state's attorney on direct, the opportunity for cross-examination was available, there was opportunity for presentation of arguments to the jurys, verdicts were rendered and the opportunity for appropriate motions after the verdict presented. Petitioner, as a layman unfamiliar with the rules of evidence or law pertaining to the charges for which he was being tried or the Illinois procedures by which he was being tried, was left without the aid of counsel to conduct his own defense through this series of proceedings.

Even in the simplest case such a necessity would raise a serious question as to the fairness of the trials. In these two cases, moreover, there were unusual and complicated problems of defense for which the aid of trained and competent counsel was essential to a fair trial. Inadequate and limited as the common law record is in these cases, it is apparent from that record that the lack of counsel substantially prejudiced the defense. Jurors who were open to challenge because they had served in the trials pursuant to one of the indictments for armed robbery, were empaneled, without challenge by the petitioner, in the trials for burglary, involving one of the same incidents. On appeal, failure of petitioner to interpose a challenge to the qualification of such jurors was used as a ground for not considering his contention that they were improperly utilized. Similarly, the failure of petitioner to enter a plea of former conviction and take an exception to a denial on the ground of double jeopardy was put forward as ground for finding no merit in his assignment of error to the effect that he had already been tried and convicted on charges arising out of the same crimes. Objections to testimony on direct examination, cross-examination, the offering of testimony on his own behalf, the request for adequate instructions, or the making of arguments to the jury offered opportunities

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to sharpen the consideration of these questions on the record and, perhaps, additional ones not on the record, which were both important to the defense and highly technical in character.

Under repeated decisions of this court, the inability of a layman to match a skilled prosecutor whom he confronts in the courtroom, deal with the law's complexity and requirement for skill and training in the adequate conduct of a criminal trial, or cope with the technical aspects of particularly difficult legal questions, have been deemed circumstances which required the aid of counsel to satisfy the requirements of due process. Those decisions are controlling here.

The circumstances of the particular situation, as recited above and apparent from the common law record, distinguish the holding of *Betts* v. *Brady*, 316 U. S. 455, and bring the present case within the purview of a series of decided cases in this court since that decision.

Furthermore, wholly apart from these distinguishing circumstances and subsequent controlling decisions, the ruling of *Betts* v. *Brady* should be specifically modified, in at least the limited particular, to require that when a party charged with a serious crime desires and requests the assistance of counsel in sustaining a plea of not guilty, the failure of the court to provide aid of counsel by effective appointment deprives the defendant of due process. To deny a party who is accused of serious crime and is desirous of sustaining a plea of not guilty, the aid of appointed counsel during the trial when he is unable to procure assistance of his own choice through lack of funds will invariably work hardship upon him in the conduct of his defense and render the proceedings devoid of that fairness which legislation, judicial ruling and public policy have determined to be fundamental to due process of law. It

will also continue to place a difficult burden of review of the detailed facts in each such case where the accused is denied the assistance of counsel he desires for his defense, which this tribunal can not discharge adequately with fairness to this class of unfortunate persons.

Such a ruling need not be extended to cover those classes of cases in which the defendant pleads guilty, upon being advised of his rights of trial or in which the defendant refuses to avail himself of this assistance or waives his right to it.

If the Court should feel that the application of such a rule by this Court to criminal proceedings in all jurisdictions is not necessary or desirable, because the laws and procedures of given jurisdictions are deemed adequate to protect the rights of persons accused of serious crimes, it should nonetheless employ this rule in such cases arising in the State of Illinois where the procedures open to a defendant to correct elements of unfairness involving the right to counsel are inadequate, cumbersome and unduly difficult.

Argument

The Supreme Court of Illinois affirmed petitioner's conviction in the four cases to which the writ of error was addressed upon the assumption that the petitioner did not argue or press his assignment of error that he was denied due process and equal protection of the law, in violation of the State and Federal Constitutions. (See opinion, R. 41). Therefore, it did not rule upon the question of whether or not the Constitution of the United States imposes an obligation upon a state: to afford a defendant accused of a serious crime a reasonable opportunity to secure and be defended by counsel of his own choice; or, in absence of counsel of his own choice, in the circumstances of the particular situation here, to provide appointive counsel to

assist him in conducting his defense; and to do so in such a manner and at such a time as to make such appointment effective to provide adequate opportunity for the accustomed incidents of consultation and preparation before trial.

Hence, it neither passed upon nor considered the federal questions presented here and its affirmance of the judgments of the Circuit Court of McHenry County should be reversed if the rights guaranteed to petitioner by the Fourteenth Amendment have been violated. Petitioner submits that they have been so violated. All that the opinion of the Supreme Court of Illinois passed on with regard to the right of petitioner to counsel was that the court below did not violate the state statute (Illinois Rev. Stat. 1931, c. 38, para. 752) which is to the effect that a court is required to provide counsel for a defendant when he shall state on oath that he is unable to procure counsel. This ruling of the Illinois Supreme Court, even if it were correct, based upon the absence from the common law record of any notation of such an oath, does not preclude or foreclose this Court from a review of the federal questions arising out of the denial of rights of counsel guaranteed by the due process of law clause of the Fourteenth Amendment. *Cf. Williams* v. *Kaiser*, 323 U. S. 471, *Smith* v. *O'Grady*, 312 U. S. 329.

We do not understand the Supreme Court of Illinois to hold or the State to contend that in this situation petitioner waived his rights to counsel; were it so contended, the facts of record rebut any such contention, showing that in each case petitioner both indicated his desire to obtain the services of his own counsel, or, in absence thereof, appointive counsel (R. 5, 13, 17, 25) and that the trial court granted petitioner's desire for counsel by designating such counsel (R. 5, 13, 17, 25). Nor is the state statutory requirement of

request for counsel under oath necessary to create the federal right to counsel such as is provided under the Fourteenth Amendment. *Tompkins* v. *Missouri*, 323 U. S. 485.

Accordingly, the contentions here are addressed primarily to whether or not petitioner had been deprived of the rights to counsel which are a "part of the due process which the Fourteenth Amendment exacts on the state which imposes sentence." *Foster* v. *Ill.*, 332 U. S. 134, 137. The discussion in this brief of assignments of error involving other substantive questions, including those of double jeopardy, the use of the same jurors in the various cases and the improper entry of consecutive sentences (see items 4, 5 and 6 in Specifications of Errors to be Urged), they being primarily matters of state law, will be used to illustrate the technical and difficult problems of defense which petitioner, as a layman, could not adequately handle.

I

Due Process of Law under the Fourteenth Amendment Was Violated in Each of the Four Cases by Reason of the Deprivation of Petitioner's Use of His Own Attorney.

In each of the four cases to which the writ of error in the Supreme Court of Illinois was addressed, the minutes of the common law record show that at the time the petitioner was arraigned he asked the court for a week's continuance in order that he might have the aid and assistance of his own counsel, a Mr. W. W. Ryan, who was then busy in another city some distance away (R. 5, 13, 19, 25). In each case this request was rejected and the petitioner compelled to continue with the proceedings without the services of his own attorney. In each case the court thereupon appointed "temporary counsel to make motions in behalf of said defendant" (R. 5, 13, 19, 25).

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In so far as the common law record shows, in the form of the judge's minutes of the arraignment proceedings, no motions were made and in each case the only action of the defense recorded was the entry of a "temporary plea of not guilty" to the particular crime "in manner and form as charged in said indictment" (R. 5, 13, 19, 25).

Thus the record presents in each of the cases below the situation of an accused forced to plead to an indictment without the aid and advice of his own counsel whose presence he requests.

This court has ruled recently in *House* v. *Mayo*, 324 U. S. 42 that a similar course of judicial conduct was a deprivation of petitioner's constitutional rights to a fair trial. In that case as in this one the attorney for the defendant was in another city at the time he was arraigned; the accused asked for time to communicate and consult with his attorney and that the proceedings be deferred until his attorney could be present; the request was denied; and he was forced to plead forthwith to the indictment. That case arose on a petition for habeas corpus which had been denied without requiring the respondent to answer and without a hearing. The Court treated the allegations as true. See 324 U. S. 43. Referring to these allegations, the *per curiam* opinion states:

> "From them it appears that the trial court, without warning, and over petitioner's protests, forced him to plead to the information without the aid and advice of his counsel, whose presence he requested. This was a denial of petitioner's constitutional rights to a fair trial, with the aid and assistance of counsel whom he had retained" (324 U. S. 45-46).

According to that opinion, in which all the court joined, except Mr. Justice Roberts, it was not necessary to its decision to determine in advance whether the state would

have been required to appoint counsel for petitioner on the facts alleged and the court, therefore, did not find it necessary to consider the line of cases involving that separate and highly controversial question to be discussed below (See III).

> "It is enough that petitioner had his own attorney and was not afforded a reasonable opportunity to consult with him" (324 U. S. 46).

Hence, here, if the rule of *House* v. *Mayo* is followed, the petitioner's rights to due process of law have been violated in each of the four cases regardless of the court's view as to whether or not appointed counsel was required on the peculiar circumstances of this case or the fact that "temporary counsel" was appointed for the arraignment proceedings.

The deep concern embodied in this holding of the right of an accused to have the benefit of assistance of his own lawyer in important criminal proceedings is emphasized by the court's specific notation that:

> "The fact that petitioner pleaded guilty after the denial of his request for time to consult with his counsel does not deprive him of his constitutional right to counsel" (324 U. S. 46).

There would seem to be all the more occasion for honoring this principle in the situation at hand where the accused was determined to fight the charges of the state and exercised every defensive measure made available to him in the criminal procedure both at the time of arraignment and in the subsequent trial.

The rule of *House* v. *Mayo* did not spring unheralded. It was presaged in the earlier leading case of *Powell* v. *Alabama*, 287 U. S. 45 (1932), which is also a compelling precedent here.

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In discussing the phase of the case involving the arraignment of the defendants upon the return of the indictment, when they pleaded not guilty, Mr. Justice Sutherland observed that:

> "It is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice" (287 U. S. at page 53).

Cf. also *Dillingham* v. *U. S.* 76 F. 2d. 36 (CCA 5th, 1935); *cf.* also *U. S.* v. *Bergamo* et al., 154 F. 2d 31 (CCA 3d, 1946).

The wisdom of the principle is amply illustrated in subsequent events in the cases at bar. Petitioner found himself represented at some stages of the proceeding by one counsel appointed by the court on the spot, only to have the responsibilities for his freedom passed on to another stranger at the next stage of the proceedings, and, finally, undergoing the trial in certain of the cases with counsel previously appointed away on other business or permitted to withdraw from the proceedings. It can hardly be argued, human nature being what it is, that the caliber of defense made available to the accused by the appointive process in the ordinary criminal proceeding was equivalent in effectiveness to that which might have been available to petitioner had the trial court accorded him adequate opportunity to be represented by counsel of his own choice, feeling a personal responsibility to him as well as to the court.

In the case of *Von Moltke* v. *Gillies* (No. 73, October Term, 1947), the majority opinion of Mr. Justice Black described a situation which, while not invariably true of appointive counsel, must nonetheless be taken into account in measuring the damage to an accused's rights when he is denied an opportunity to employ his own counsel. It was said:

> "It is in this light that we view the appointment of counsel for petitioner when she was arraigned. This

> lawyer, apparently reluctant to accept the case at all, agreed to represent her only when promised by the judge that it would take only two or three minutes to perform his duty. And it seems to have taken no longer. Even though we assume that this attorney did the very best he could under the circumstances, we cannot accept this designation of counsel by the trial court as anything more than token obedience to his constitutionally required duty to appoint counsel for petitioner. Arraignment is too important a step in a criminal proceeding to give such wholly inadequate representation to one charged with a crime."

Without implying criticism of the appointive counsel in the trial court in the cases at bar, it is fair to say that both on principle and in view of the events of record, the action of the court in refusing petitioner adequate opportunity to be represented by his own counsel at the very outset of the case was a deprivation of due process of law.

One can imagine the sense of public outrage which the average person would feel if an esteemed neighbor or citizen were brought before the court and forced to submit to arraignment proceedings without benefit of his own counsel by reason of a denial of a week's delay to give him the opportunity to enjoy the services of his counsel at that time engaged in another city. The law requires the same deference to the rights of the obscure person charged with the crime of armed robbery or burglary.

Of course the exercise of this right and reliance upon it may be the subject of abuse to delay unduly the prosecution of criminals and to occasion empty gestures by parties who ultimately must depend upon the court for appointive counsel. Nothing in the record here implies a lack of *bona fides* in the request of petitioner for a continuance of the arraignment proceedings on April 9, 1932, in order that he might utilize the assistance of his counsel, Mr. W. W. Ryan.

These proceedings, therefore, at the outset became charged with unfairness and disadvantage to the petitioner. The rejection of petitioner's request by the trial court had an indelible and imponderable effect upon the entire proceedings, which is not erasable except by an order reversing the Supreme Court of Illinois' affirmance of the judgments below.

II

Due Process of Law under the Fourteenth Amendment was violated by the denial to Petitioner and his appointed Counsel of adequate opportunity for consultation and preparation before the trials on the two indictments for armed robbery

The next phase of the rule of *Powell* v. *Alabama* involved here arises from facts of record which demonstrate, petitioner contends, that such designation of counsel as was attempted in the cases on Indictments No. 25503 and No. 25505 did not afford adequate opportunity for consultation and preparation and amounted to "a denial of effective and substantial aid in that regard." See *Powell* v. *Alabama*, 287 U. S. at p. 53.

The controlling facts available from the common law record concerning the nature, character and circumstances of the representation of petitioner by counsel in the trials on indictments No. 25503 and No. 25505 have been set forth above. (See Statement, pp. 4-6). There may be many other facts which might support the conclusion that defendant was deprived of the effective aid and assistance of counsel which due process would require; such other facts can not be ascertained from the common law record.

For example, there is no information as to the date of the appointment of Mr. Feldman, the original appointed counsel, who appeared for petitioner throughout the trial on No. 25503 and part of the trial on No. 25505. It was some

time between April 9, the date of the arraignment, and April 18, the date of the trial on No. 25503. We do know that the burden of representation in the trial on No. 25505 fell on Mr. Johnson, in the absence of Mr. Feldman on April 19; and that Mr. Johnson had only been appointed the day before to assist Mr. Feldman in selecting the jury; and, apparently, Mr. Johnson did not expect to carry the brunt of the trial until confronted by Feldman's absence and the court's reappointment on April 19.

It can be strongly inferred from Feldman's conduct, as reported in the judge's minutes on the trial of No. 25503 on April 18 that he considered himself wholly unprepared. His first move was for a continuance. It was denied.

A commentary on and reflection of his lack of preparation was the necessity which prompted his asking the court for time at the end of the state's case to confer with his client (petitioner) as to witnesses for the defense. One can assume that a defense attorney who has not consulted adequately with his client before the end of the state's case is woefully unprepared; nor did the court's ungenerous allowance of ten minutes to prepare on that subject compensate for this apparent disadvantage. Forced to rely here on the common law record, one can only conjecture concerning the extent and character of the defense during the examination of witnesses and the issuance of instructions. It is clear from the record that arguments for the defense were waived in both Nos. 25503 and 25505.

We are not forced to rely upon conjecture to determine the extent of preparation and consultation permitted to petitioner and appointed counsel for the arraignment proceedings in *all four of the cases* (R. 5, 13, 17, 25). The petitioner appeared for himself at the outset, moved for a continuance in order to have the services of his own counsel, and was represented by "temporary counsel," a Mr. Joslyn,

who was appointed by the court upon the denial of the motion for continuance. The minutes of the judge note that "Thereafter conferring with his counsel . . . again comes the said defendant and enters a temporary plea of not guilty" (R. 5, 13, 17, 25). Since the whole arraignment proceedings in all four cases occurred on April 9, 1932, little opportunity for consultation and preparation was permitted.

Hence, even with the limitations that the common law record imposes upon the development of the deprivation of effective aid and assistance of counsel in this proceeding, there is an adequate basis in controlling recent decisions of this Court for setting aside the judgments below.

In *Hawk* v. *Olsen*, 326 U. S. 271, this Court enunciated the principle that should govern here. In reversing an order of a state court dismissing a petition for a writ of *habeas corpus* the court accepted as true allegations of fact which, while not identical with those here apparent on the record, are substantially similar in their result. See 326 U. S. 276-7. In that case, as in this one, the defendant was arraigned, had no assistance or advice except those designated by public authority to defend him; in that case the defendant moved the trial court for a continuance for the purpose of consulting counsel and preparing his defense; in this case the defendant both moved the court for continuance at the time of the arraignment in order to consult his own counsel and the appointed counsel at the time of the trial moved the court for a continuance in order to have time for adequate preparation for trial; in that case as is apparently true in this one, the trial was initiated without an opportunity for adequate consultation between the defendant and the officers of the court whose duty it was to defend him—or any substantial measures of preparation for trial.

In its review, this Court felt it a duty to determine whether or not the denial of a motion for continuance under the facts

alleged violated due process. This statement in the opinion of Mr. Justice Reed seems equally applicable to this case:

> "We think there was an allegation that no effective assistance of counsel was furnished in the critical time between the plea of not guilty and the calling of the jury. Continuance may or may not have been useful to the accused, but the importance of the assistance of counsel in a serious criminal charge after arraignment is too large to permit speculation on its effect. We hold that denial of opportunity to consult with counsel on any material step after indictment or similar charge and arraignment violates the Fourteenth Amendment" (326 U. S. 278).

The principle embodied in *Hawk* v. *Olsen* had been previously established by this Court in older decisions. See *Powell* v. *Alabama*, 287 U. S. 45; *Avery* v. *Alabama*, 308 U. S. 444 and *cf. White* v. *Ragen*, 324 U. S. 760 at pages 762-764.

The facts in the leading case of *Powell* v. *Alabama* are well known to this Court but include other elements not present here which might preclude one from urging it as a compelling precedent on the facts. But the expression of the principle involved here in Justice Sutherland's opinion seems appropriate to this case. The opinion said:

> "In any event, the substance lends emphasis to the conclusion that during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself" (287 U. S. 57).

Subsequently, in the opinion, in commenting upon the problem of continuances in criminal proceedings and the

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desirability of the prompt disposition of criminal cases, it was said:

> "But in reaching that result, a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice" (287 U. S. 59).

The decision of this Court in *Avery* v. *Alabama, supra,* in no sense qualified these principles and that case is clearly distinguishable upon its facts from the one at bar. The opinion of the Court, delivered by Mr. Justice Black, carefully preserved the essence of the doctrine of effective appointment, stating:

> "but the denial of opportunity for appointed counsel to confer, to consult with the accused, and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitutional guaranty of assistance of counsel can not be satisfied by mere formal appointment" (308 U. S. at 446).

In holding that the fact, standing alone, that a continuance has been denied, does not constitute a denial of the constitutional right to assistance of counsel, the Court nonetheless imposed upon itself the obligation of scrupulously reviewing the record to ascertain whether other facts would lead to a determination that the defendant's constitutional right to counsel was violated. It did so review the record in that case in detail. It concluded that the record showed that petitioner's attorneys in that case were able to make adequate inquiries in the vicinity of the crime between their appointment on Monday and the trial on Thursday. It was also concluded that the examination and preparation of the case had been adequate for counsel to exhaust its every angle.

The character of the analysis of the record in *Avery* v. *Alabama*, poses the issue for the Court in this case. Is the Court of the opinion, on the facts of record available here, that the circumstances of this case show a fairly conducted trial with a careful safeguard of petitioner's rights? Or is it of the opinion that the proceedings below may be more properly characterized by the now famous description of the situation in *Powell* v. *Alabama*.

> "It is not enough to assume that counsel thus precipitated into the case thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thorough-going investigation might disclose as to the facts. No attempt was made to investigate. No opportunity to do so was given. Defendants were immediately hurried to trial. Chief Justice Alderson, after disclaiming any intention to criticize harshly counsel who attempted to represent defendants at the trials, said: 'The record indicates that the appearance was rather pro forma than zealous and active.' Under the circumstances disclosed, we hold that defendants were not accorded the right of counsel in any substantial sense. To decide otherwise, would simply be to ignore actualities. This conclusion finds ample support in the reasoning of an overwhelming array of state decisions . . ." (287 U. S. 58).

III

Due Process of Law under the Fourteenth Amendment required the representation of Counsel in the trials for burglary on Indictments Nos. 25504 and 25506 under the circumstances of the particular situation

It is also a well settled principle of "the rule of Powell *v.* Alabama" that "in the circumstances of a particular situation", assignment of counsel by the court for indigent defendants in criminal cases may be "essential to the sub-

stance of a hearing" as part of the due process which the Fourteenth Amendment exacts from a State which imposes sentence. See *Foster* v. *Illinois*, 332 U. S. 134; *Carter* v. *Illinois*, 329 U. S. 173.

A minority of this Court has consistently contended that the Sixth Amendment guaranty of the right to counsel in criminal cases is applicable to proceedings in state as well as federal courts on the theory that the Fourteenth Amendment made the Sixth applicable to states. cf. the dissenting opinion of Mr. Justice Rutledge in *Foster* v. *Illinois*, *supra*; cf. also dissenting opinion of Mr. Justice Black in *Betts* v. *Brady*, *supra*. Likewise, a minority would esteem the right to counsel to be fundamental to the fairness requisite in serious criminal cases for due process as provided by the Fourteenth Amendment, apart from the Sixth. cf. dissenting opinion of Mr. Justice Black in *Betts* v. *Brady*, *supra*, at pp. 475 *et seq.*

The Statement contains a full recital of the circumstances in the trials of petitioner on indictments Nos. 25504 and 25506, within the limitations imposed by the common law record, as they give rise to a consideration of and application in this case of this phase of "the rule of Powell *v.* Alabama." (See Statement, pp. 6-9). It is sufficient to repeat here that the trial court permitted previously appointed counsel to withdraw from these cases on the day of the trials but before the trials began; that it refused to appoint substitute counsel despite petitioner's remonstrance that he had no funds of his own available to employ counsel; that the petitioner, a layman was forced to conduct his own defense in the trial of the cases on not guilty pleas to charges of burglary; that the trials included the usual steps of empaneling a jury, the submission of testimony, the opportunity for argument, the giving of instructions, the return of verdicts with the opportunity for post verdict measures of defense; and, lastly, that these trials involved

peculiar and highly technical legal questions such as double jeopardy and disqualification of jurors, by reason of previous trials on the same incidents on armed robbery indictments before some of the same jurors.

On these facts the treatment of the question under this heading necessarily brings the case within the area of difference between the majority and minority position on "the rule of Powell *v.* Alabama" as indicated above. At the outset here we shall try to indicate precisely where the contentions impinge upon these differing views recently voiced.

All of petitioner's three contentions below under this heading are within the framework of the test set forth recently by the majority in *Foster* v. *Illinois, supra.* They are addressed to the challenge there set forth:

> "And, so, in every case in which this doctrine was invoked and due process was found wanting, the prisoner sustained the burden of proving, or was prepared to prove but was denied opportunity, that for want of benefit of counsel an ingredient of unfairness actively operated in the process that resulted in his confinement" U. S.

But the first two of petitioner's contentions below are addressed to limited modifications of the holding of the majority in *Betts* v. *Brady, supra,* which this case and a review of the authorities indicate as desirable. The third contention below is that the holding in *Betts* v. *Brady, supra,* is distinguishable on its facts from the case at bar and, therefore, is not controlling.

It will be petitioner's first contention that the Court should specifically or inferentially modify its holding in *Betts* v. *Brady* in at least one particular, namely, to require that when a party charged with a serious crime desires and requests the assistance of counsel in sustaining a plea of

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not guilty the failure of the court to provide aid of counsel during the course of the trial by effective appointment deprives a defendant of due process.

It may be that the Court will feel that this should not be extended to cases arising in jurisdictions where the laws and procedures are deemed adequate to protect the rights of persons accused of serious crime. It is petitioner's second contention that, in any event, the Court should specifically announce this rule for such cases arising in the state of Illinois, so long as the procedures open to a defendant to correct elements of unfairness involving the right to counsel or other deprivations of constitutional right after conviction are inadequate, cumbersome and unduly difficult in that jurisdiction.

Petitioner's third contention is that the case at bar is distinguishable on its facts from *Betts* v. *Brady* and that circumstances exist here, which, under more recent controlling decisions of this Court, justify a determination that the requirements of the rule of *Powell* v. *Alabama* have been met and due process of law not accorded.

A. *Petitioner's First Contention*

In the leading case of *Powell* v. *Alabama*, the Court indicated the essential scope of the doctrine that assignment of counsel may be essential to due process exacted by the Fourteenth Amendment in particular situations because it might be essential to the substance of the hearing. The reasoning in the opinion of Mr. Justice Sutherland in that case has an important bearing here. He said:

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment

> is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel in every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence" (287 U. S. 68-69).

These considerations have a peculiar and especial validity in situations where a person, charged with serious crime, feels the need of and requests the assistance of appointive counsel because he does not have the funds or the opportunity to secure his own attorney. Accused's expressed awareness of his own inadequacy to meet the threat to his freedom which must be defended through complicated legal proceedings involving unfamiliar and technical questions is an important circumstance. It sees the case apart from those in which the accused does not voice his need for the assistance of counsel or waives the opportunity or privilege to obtain it. *Cf. Foster* v. *Illinois, supra; Carter* v. *Illinois, supra.* This factor was given consideration in *Williams* v. *Kaiser*, 323 U. S. 471, at 474-475.

A second particular circumstance in the case at bar is that the petitioner was forced *to undergo trials* on indictments for burglary without the assistance of counsel. These trials, as is the case with many criminal procedures, involved the technical procedures, unfamiliar to the layman, which, in their simplest form, present such requirements for judgment, knowledge and experience as to impel customarily the retention of skilled counsel when the defendant is able to employ such assistance. Juries were empaneled; state's witnesses were put on the stand and examined by the state's

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attorney on direct with the usual opportunity for objections to incompetent or irrelevant testimony; the opportunity for cross-examination was presented and petitioner, from the record, attempted to cross-examine the witnesses; there was opportunity for presentation of arguments to the jury and to request the court for particular instructions; verdicts were rendered and the opportunity for appropriate motions after the verdict presented. At the outset of the trials there was opportunity for presentation of motions addressed to any defects in the indictments or pleas such as the plea of former conviction; indeed, petitioner's counsel in the preliminaries to the previous trials on indictment No. 25503 moved to quash the indictment.

Petitioner, a layman, and presumably unfamiliar with the rules of evidence and law or the Illinois procedures by which he was being tried, was left without the aid of counsel to conduct his own defense through this series of proceedings. It is submitted that these circumstances should be adjudged sufficient in a serious criminal case to require for due process the appointment of counsel when requested by the accused who has entered a plea of not guilty because of his own inability to secure counsel. It is too much to expect that in such a situation the layman's intuition and the judge's fairness, no matter how acute both may be, are likely to result in an adequate protection of the rights of the accused.

Since *Powell* v. *Alabama* not many cases have arisen which involve this particular circumstance. It is submitted that that is probably due to the fact that in most cases where a defendant enters a plea of not guilty and requests the assistance of appointed counsel, it is granted.

It must be conceded that the decision of the majority in *Betts* v. *Brady* was to deny to a party requesting appointed counsel the right to it during his trial on an indictment for

robbery. It is on this score that petitioner submits the holding of *Betts* v. *Brady* should be reconsidered and modified despite the fact that there are several distinctions from the present case which will be discussed below.

It is submitted that the fundamental feeling of the majority of the Court, as expressed in Mr. Justice Frankfurter's opinion, was that due process of law does not demand in every criminal case, whatever the circumstances, that the state must furnish counsel to an indigent defendant. The Court was concerned with the burden to which a guarantee of the right to counsel for indigents in every criminal case would place upon the states. See 316 U. S. 455 at p. 473. To modify that holding, as suggested by the facts in this case, to require the assistance of counsel where the defendant pleads not guilty to a serious crime and requests appointed counsel because he lacks the funds to secure his own attorney would avoid the consequences feared by the majority in *Betts* v. *Brady* and provide a workable interpretation of the Fourteenth Amendment for state legislatures and the courts.

Such a modification so limited would go far to meet some of the considerations voiced by Mr. Justice Black in his dissenting opinion in that case, tending to eliminate a practice which subjects men presumed to be innocent "to increased dangers of conviction merely because of their poverty." See 316 U. S. p. 476. Furthermore, such a modification would eliminate the extremely difficult burden of review of the detailed facts in every case such as the one at bar where it is necessary to determine whether the denial of assistance of counsel worked an undue hardship in the course of the trial. The very limitations of the review itself, when magnified by the inadequacies of the records such as the common law record available here, make the responsibility of the Court as assumed in *Betts* v. *Brady*

a difficult one to discharge with grave danger of injustice. Few cases of trials on "not guilty" pleas present a record where an appellate court can say "there was no question of the commission of a robbery" or where the question of guilt or innocence are so simple as in that case. Certainly the present case permits no such firm conclusions because little can be ascertained from the record of the nature of the defense, conceived or intended by the petitioner.

Finally, such a modification of *Betts* v. *Brady* would conform to the generally held conception of fairness which legislation, judicial rulings and public policy have determined to be fundamental to due process of law. Both the footnotes to the majority opinion in *Betts* v. *Brady* and the appendix to the dissenting opinion set forth statutory and case references which adequately support this assertion. (See *Betts* v. *Brady, supra,* footnotes 21-30 at pp. 468-471 and Appendix at pp. 477 et seq.)

B. *Petitioner's Second Contention*

A major factor in the holding of the majority in *Betts* v. *Brady* was its regard for the fairness of Maryland procedure. The majority opinion of Mr. Justice Frankfurter said:

> "It is quite clear that in Maryland if the procedure had been otherwise and it had appeared that the petitioner was, for any reason, at a serious disadvantage by reason of his lack of counsel, a refusal to appoint would have resulted in a reversal over a judgment of conviction.
>
> "Only recently the Court of Appeals has reversed a conviction because it was convinced on the whole record that an accused, tried without counsel, had been handicapped by the lack of representation." 316 U. S. pp. 472-473.

Also the availability of adequate facts of record in that case enabled this Court on review to determine for itself that there was no injustice to the accused resultant from his lack of counsel.

It is submitted that, in view of its recent experiences, the Court can have no such confidence in Illinois procedure. We need not explore in detail here the difficulties which have been encountered in assuring due process of law to persons imprisoned in Illinois who claim to have been deprived of their constitutional rights in the course of trial. Many pertinent observations have been set forth recently in the concurring opinion of Mr. Justice Rutledge, in which he was joined by Mr. Justice Douglas and Mr. Justice Murphy in *Marino* v. *Ragen*, No. 93, October Term, 1947. In view of the difficulties of adequate check and review of abuses by trial courts which are met under Illinois procedure, it would be fair and proper for this Court to employ a different presumption from that used in treating cases from other states where the procedures of review are not so inadequate, cumbersome and difficult. The majority of this Court in *Foster* v. *Illinois* has stated that it would only find due process wanting in those cases.

> "where the prisoner sustained a burden of proving, or was prepared to prove but was denied opportunity, that for want of benefit of counsel, an ingredient of unfairness actively operated in the process that resulted in his confinement." 332 U. S. 137.

Yet in that very case the Court was forced to leave out of its consideration claims which were "not open for consideration on the common law record which alone was before the Illinois Court." The opinion went on to say, regarding such claims,

> "they must be raised by whatever procedure Illinois may provide, or, in default of relief by appropriate

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> Illinois proceedings, by a new claim of denial of due process for want of such relief."

The concurring opinion of Mr. Justice Rutledge in *Marino* v. *Ragen*, written subsequent to *Foster* v. *Illinois*, develops the difficulties and handicaps which are encountered in utilizing the Illinois procedures.

The present case is illustrative. Petitioner felt forced to resort to the writ of error despite the fact that in such a proceeding, where there is no bill of exceptions, review is limited to the common law record. This course has severely restricted and disadvantaged the petitioner in getting the full facts and circumstances of this case before the court. A full record concerning the circumstances of the proceedings in the Trial Court or a hearing on a writ of *habeas corpus*, might have disclosed many factors which are not presented by the common law record, some of which might influence this Court to render a decision in petitioner's favor.

Where the rule of review is made to depend, as it is in this situation, upon "the circumstances of a particular situation," that rule works an injustice where the full facts can not be presented. To a suggestion that additional facts might have been put forward through a writ of *habeas corpus*, the observations on the hazards and difficulties of such a course in the concurring opinion in *Marino* v. *Ragen* are a sufficient answer at this time.

In speaking of the various remedies open to a party in Illinois, situated such as petitioner, Mr. Justice Rutledge said:

> "The Illinois scheme affords a theoretical system of remedies. In my judgment, it is hardly more than theoretical. Experience has shown beyond all doubt that, in any practical sense, the remedies available there are inadequate. Whether this is true because in fact no remedy exists, or because every remedy is so

limited as to be inadequate, or because the procedural problem of selecting the proper one is so difficult, is beside the point. If the Federal guarantee of due process in a criminal trial is to have real significance in Illinois, it is imperative that men convicted in violation of their constitutional rights have an adequate opportunity to be heard."[3]

If under these conditions, it would be both fair and appropriate for the Court to no longer require exhaustion of its present scheme of ineffective and inadequate remedies before permitting resort to the Federal District Courts sitting in Illinois, as is proposed by the concurring opinion in *Marino* v. *Ragen,* surely, it would be equally fair and appropriate to make a special application of the rule of *Powell* v. *Alabama* in Illinois cases. It is submitted that the holdings of *Betts* v. *Brady* made applicable to a Maryland case because of the court's confidence in Maryland procedures should not be applied to a case coming from the Illinois courts, where it is impossible to determine from the record that due process has been properly respected in view of the inadequacies of the record available. By ruling in this case that the proof of the denial of a request for the assistance of appointed counsel in the trial of a plea of not guilty to a charge of a serious crime is sufficient in Illinois cases to meet the test of *Powell* v. *Alabama* and *Foster* v. *Illinois,* the Court would cure the injustice done here; also, it could provide a workable rule for dealing with similar situations arising in Illinois without disturbing the adequate procedures of other states or forcing them to be "straitjacketed in this respect." *Cf. Betts* v. *Brady,* 316 U. S. 472.

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[3] See note, a Study of the Illinois Supreme Court, 15 U. of Chi. L. Rev. 107 where it was said at 128:

"The inevitable conclusion must be reached that the State of Illinois provides no satisfactory or adequate method for post-conviction hearings."

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C. *Petitioner's Third Contention*

If the Court should feel disinclined to modify its holding in *Betts* v. *Brady, supra,* in the limited particulars suggested above, it nonetheless should hold that case not to be controlling here because of certain substantial differences in the circumstances of the particular situation in that case and the case at bar.

In *Betts* v. *Bradyd, supra,* there was no trial before the jury as in these cases. In commenting on that factor, the majority opinion in *Betts* v. *Brady* remarked:

> "Such trials, as Judge Bond remarks, are much more informal than jury trials and it is obvious that the Judge can much better control the course of the trial and is in a better position to see impartial justice done than when the formalities of a jury trial are involved." 316 U. S. 472.

Also in that case this Court, on review, felt that there was a fair trial and no injustice had been done. It is doubtful whether on the limited record available here, this Court could reach the same conclusion. Little is disclosed concerning the nature of the defense or the basis for the pleas.

An even more compelling circumstance in each of these cases which was not present in *Betts* v. *Brady* and serves both to distinguish that case and bring these cases within the requirements of the test of *Foster* v. *Ill.,* was the presence in the trials on Nos. 25504 and 25506 of technical and complicated questions of law, important to the defense, for which the layman petitioner could not be considered equipped to handle. In fact, the presence of these questions is shown by the record to have reacted to the active prejudice of the defense on appeal.

As the Statement discloses in detail, some of the jurors in the trials on both indictments Nos. 25504 and 25506 for

burglary had served in the trial of the petitioner for armed robbery on indictment No. 25503. The failure of the petitioner to challenge these jurors and disqualify them or obtain a ruling over a challenge and an exception thereto was the basis of the refusal of the Supreme Court of Illinois to consider the assignment of error on that score (R. 41). Cf. Clark, Criminal Procedure, (2d Ed.) p. 521. *Swarnes Adm'x* v. *Sitton,* 58 Ill. 155.

Likewise, there was an important and highly technical circumstance arising from the fact that the indictments in Nos. 25504 and 25506 were based on the same incidents on which petitioner had been tried for armed robbery on indictments Nos. 25503 and 25505. Whether or not this gave rise to a plea of double jeopardy need not be decided here. It is sufficient to note that the Supreme Court of Illinois, in addition to discussing this assignment of error on its merits, also held that there was no merit to the contention because no bill of exceptions were filled and there was

> "no showing that a plea of former conviction was entered." (R. 39)

No such technical questions confronted the accused in conducting his own defense in *Betts v. Brady, supra.* Moreover, there are decisions of this Court since *Betts* v. *Brady,* involving similar questions, which, it is submitted, are controlling. In *Williams* v. *Kaiser,* 323 U. S. 471 this Court reversed a ruling of the Supreme Court denying writ of habeas corpus. The accused had been denied the aid of counsel at his trial on a criminal charge. There, the defendant had pleaded guilty to an indictment charging him with robbery by means of a deadly weapon and had been sentenced to a term of 15 years. The Court noted the important distinctions in the law of Missouri between various

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indictments which might have been brought in under the facts of the crime charged and said:

> "These involve technical requirements of the indictment or information, the kind of evidence required for conviction, instructions necessary to define the several elements of the crime and the various defenses which are available. These are a closed book to the average layman." 323 U. S. at 474-475.

After citing the comments in *Powell* v. *Alabama* concerning the plight of the layman charged with crime in defending himself, the opinion of Mr. Justice Douglas noted:

> "These observations are as pertinent in connection with the accused's plea as they are in the conduct of a trial." 323 U. S. 475.

It was held that the circumstances alleged there were sufficient under the rule of *Powell* v. *Alabama*. The dissenting opinion of Mr. Justice Frankfurter in that case, in which Mr. Justice Roberts joined, went to the question of the procedural propriety of overruling the Missouri Supreme Court in its denial of the writ of habeas corpus and did not challenge the majority opinion in its substantive determination recited above.

Likewise, in a companion case, *Tompkins* v. *Missouri*, 323 U. S. 485, the Court ruled that the technical differences in Missouri law between the charge of murder in the first degree, murder in the second degree, and manslaughter, justified the application of the rule in *Powell* v. *Alabama*.

No subsequent case[4] reflects upon the validity of these

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[4] Cf. *Rice* v. *Olson*, 324 U. S. 786 at pp. 789, 790 where in reversing the denial of a writ of habeas corpus because of absence of counsel, the opinion of Mr. Justice Black stressed the petitioner's need for legal counsel because the case involved a question of Federal jurisdiction "which clearly demands the counsel of experience and skill." 324 U. S. at 789.

holdings, and, indeed, they are cited in *Foster* v. *Illinois, supra,* as examples of cases where the prisoner proved or was prepared to prove

> "that for want of benefit of counsel, an ingredient of unfairness actively operated in the process that resulted in his confinement." 332 U. S. 137.

The case of *Hawk* v. *Olson, supra,* by a unanimous Court (Mr. Justice Jackson took no part), decided in 1945, is a compelling precedent. The defendant there pleaded not guilty to a charge of murder in the first degree; he alleged that he was tried and convicted after denial of his motion for continuance, with only assistance from the Public Defender who entered the case without preparation. The Court's opinion (by Mr. Justice Reed) noted that homicide in Nebraska has degrees and that "There are difficulties in the application of the rules". 326 U. S. 278. It then concluded:

> "The defendant needs counsel and counsel needs time",

holding that there was a denial of due process violative of the Fourteenth Amendment, if the allegations were proven true.

Conclusion

Finally, it would seem that the cumulative effect of the various deprivations suffered by petitioner in the course of the trials on the four indictments, taken together, was to permeate the entire proceedings in the trial court with unfairness which is not consonant with the requirements of due process of law as guaranteed to petitioner by the Fourteenth Amendment. Accordingly, the decision of the Supreme Court of Illinois should be reversed and the cause

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sent back to that court with instructions to order new trials in all four cases or such other appropriate measures as are deemed necessary to correct the injustice suffered by the petitioner.

Respectfully submitted,

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